UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

George KATSAROS, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	Civ. No. 3:00cv288 (PCD)
	:	
Ralph SERAFINO, et al.,	:	
Defendants.	:	

RULING ON DEFENDANTS SERAFINO AND GALLUP'S MOTION TO DISMISS

Defendants Serafino and Gallup move to dismiss all of Plaintiffs' claims. The motion is granted in part and denied in part.

I. JURISDICTION

Plaintiffs sue under 42 U.S.C. §§ 1983, 1985. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367(a).

II. BACKGROUND

A. Factual Background

The facts are taken as alleged in the amended complaint. Defendants Serafino and Gallup are constables of the City of Stamford. Defendants Pennell and Moavero are special deputy sheriffs of the State of Connecticut. On February 15, 1997 at approximately 1:15 a.m., Gallup "pounded" on the door to Plaintiffs Chris and Vasiliki Handrinos's home and demanded it be opened. Plaintiff Peter Handrinos opened the door, and Gallup falsely represented that he was a special deputy sheriff and that he had legal papers to serve. He displayed his badge and entered without consent and presented Chris and Vasiliki Handrinos, not with legal process, but with a letter from a minority

shareholder of the Norwalk Inn purporting to terminate their employment at the Norwalk Inn and their right to enter the Norwalk Inn property. Gallup did not leave until Chris Handrinos threatened to call the Norwalk police.

At approximately the same time, Serafino, Pennell, and Moavero entered the Norwalk Inn with automatic weapons and badges displayed. They informed the employees that they were special deputy sheriffs and that no one was permitted to leave or to make outgoing phone calls. At approximately 2:30 a.m., Chris Handrinos and George Katsaros (both of whom are directors and employees of the Norwalk Inn) and Vasiliki Handrinos (a stockholder and employee of the Norwalk Inn) and Elaine Katsaros (a stockholder of the Norwalk Inn) attempted to enter the Norwalk Inn but were denied entry and threatened with arrest. Plaintiffs demanded that Serafino produce all documents which permitted Defendants' actions. Serafino refused to produce any documents. It was not until 3 p.m. that day that, pursuant to a court order, Defendants were removed from the Norwalk Inn.

B. Procedural History

On February 11, 2000, Plaintiffs filed a complaint. On March 13, 2000, Serafino and Gallup were served. An amended complaint was subsequently filed. Serafino and Gallup now move to dismiss. Plaintiffs oppose the motion.

III. DISCUSSION

A. Motion to Dismiss § 1985 Claims

Defendants move to dismiss all Plaintiffs' claims brought pursuant to 42 U.S.C. § 1985. Plaintiffs concede that where they referred to § 1985, they had intended to refer

to § 1983. Accordingly, Plaintiffs' § 1985 claims are dismissed as to all Defendants. Plaintiffs request permission to amend their complaint accordingly, which request is granted.

B. Motion to Dismiss Due to Statute of Limitations

1. Motion to Dismiss Based on Statute of Limitations Construed as Motion for Judgment on the Pleadings

Defendants improperly move to dismiss, FED. R. CIV. P. 12(b)(6), based on the statute of limitations. A motion to dismiss for failure to state a claim looks to the sufficiency of the complaint only. A defense of the statute of limitations necessarily includes additional facts beyond the complaint, such as the date of filing of the complaint and perhaps also the date of serving the complaint. Defendants' motion to dismiss based on the statute of limitations is construed as for judgment on the pleadings. See FED. R. CIV. P. 12(c).

2. Dismissal of § 1983 Claims Based on Statute of Limitations

Plaintiffs' claims under 42 U.S.C. § 1983, which does not provide its own internal statute of limitations, requires federal courts to look to the appropriate state's general or residual personal injury statute. Owens v. Okure, 488 U.S. 235, 249-50 (1989). The appropriate Connecticut statute is CONN. GEN. STAT. § 52-577, a three-year statute of limitations.[1] Lounsbury v. Jeffries, 25 F.3d 131, 134 (2d Cir. 1994).

Defendants argue this court should also borrow the state's method of service as "part and parcel" of the statute of limitations. Defendants argue that as they were not

[1] CONN. GEN. STAT. § 52-577 provides, "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

served until March 13, 2000, service was about one month too late. The argument is rejected. The cause of action, § 1983, is federal. "[W]hen the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been 'commenced' in compliance with Rule 3." West v. Conrail, 481 U.S. 35, 39 (1987); see FED. R. CIV. P. 3.

Since Rule 3 allows commencement of the action on filing the complaint, FED. R. CIV. P. 3, Plaintiffs were four days ahead of the deadline, and their § 1983 claims are not time barred.

3. Dismissal of State Law Claims Based on Statute of Limitations

Plaintiffs assert state law claims against Serafino and Gallup: intentional infliction of emotional distress, fraud, conversion, trespass, invasion of privacy, and Connecticut state constitutional violations. The statute of limitations for tort actions is three years.[2] CONN. GEN. STAT. § 52-577; D'Occhio v. Conn. Real Estate Comm'n, 189 Conn. 162, 182, 455 A.2d 833, 842 (1983) (conversion); Krondes v. Norwalk Sav. Soc'y, 53 Conn. App. 102, 113, 728 A.2d 1103, 1109 (App. Ct. 1999) (fraud and misrepresentation); Tucker v. Bitonti, 34 Conn. Supp. 643, 646, 382 A.2d 841, 842 (Sup. Ct. 1977) (trespass). It is also three years for state constitutional claims. In re State Police Litig., 888 F. Supp. 1235, 1249 (D. Conn. 1995).

Defendants argue that Plaintiffs' state claims are time barred. Under Connecticut

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[2] The statute of limitations for neglect or default in sheriffs' and constables' duties is two years. CONN. GEN. STAT. § 52-583. Although noted, it is not asserted this statute is applicable herein.

law, the statute of limitations is tolled by actual service. Converse v. Gen. Motors Corp., 893 F.2d 513, 515 (2d Cir. 1990). Defendants argue that since they were not served until March 13, 2000, service was about one month too late.

Plaintiffs concede that if their case rested on diversity jurisdiction, state law would control and they would be barred by the statute of limitations. See Walker v. Armco Steel Corp., 446 U.S. 740 (1980). However, they counter that federal law, not state law, should control the effective commencement of the suit since they rely on supplemental not diversity jurisdiction. Thus, since the action is commenced upon the filing of the complaint, FED. R. CIV. P. 3, they conclude they were four days ahead of the deadline.

Plaintiffs' argument is rejected. "[I]t is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law." Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956). "There is simply no reason why . . . an action . . . which concededly would be barred in the state courts by the state statute of limitations should proceed . . . in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." Walker, 446 U.S. at 753. This wisdom is just as applicable to supplemental jurisdiction as it was to diversity jurisdiction. "The rationale of Walker does not change 'solely because of the fortuity' that [plaintiff] pleaded a federal claim along with state claims." Appletree Square I, Ltd. P'ship v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994). To hold otherwise would undermine the principles of the Erie doctrine and restore forum shopping to federal courts whenever a federal claim could be thrown in. The state law claims are dismissed as to Serafino and Gallup.

C. Motion to Dismiss for Failure to State a Claim

1. Standard of Review

A complaint may not be dismissed under Rule 12(b)(6) unless the movant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see FED. R. CIV. P. 12(b)(6). The factual allegations are presumed to be true, and all factual inferences are to be drawn in Plaintiffs' favor. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Heightened pleading is no longer required under § 1983. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993). Indeed,

> two - and only two - allegations are required in order to state a cause of action under [§ 1983]. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980). However, the complaint should specify the constitutional right alleged to have been violated. See Friedman v. Younger, 282 F. Supp. 710, 714 (C.D. Cal. 1968).

2. First Amendment Freedom of Speech

Plaintiffs allege that their First Amendment rights were violated when Defendants prevented the Norwalk Inn employees from making outgoing phone calls from the hotel during Defendants' control of the premises. This argument is rejected. Such alleges a violation of the Norwalk Inn's employees' rights, not of Plaintiffs' rights. Plaintiffs may not sue for violations of someone else's rights.

Plaintiffs argue that the Norwalk Inn, a corporate Plaintiff, has free speech rights exercisable through its employees. Plaintiffs cite no law for their proposition. It is not shown that corporations have free speech rights. Second, even if corporations do have free speech rights, it is not shown that such rights are vested in its employees. In any event, while Plaintiffs allege that Defendants advised the employees not to make outgoing phone calls, it is not alleged that any employee was prevented from making a phone call by force or intimidation.

Lastly, Plaintiffs argue that their free speech rights were abridged because they were not permitted to communicate with their fellow employees. This argument is without merit. While Plaintiffs may have been denied access to the Norwalk Inn, they were not denied the right to speak. They were denied the opportunity to hear from their fellow employees. They have not alleged that they were prevented from communicating any message they wished to convey to their fellow employees, if any communications were intended or attempted.[3] They remained free to speak or hear any message. They did so when they called the Norwalk Police to their aid.

Plaintiffs' § 1983 claims for denial of their First Amendment free speech rights are dismissed as to Serafino and Gallup.

3. First Amendment Freedom of Association

Defendants move to dismiss Plaintiffs' § 1983 claims for allegedly violating their freedom of association. Plaintiffs offer no opposition. Accordingly, Plaintiffs' § 1983 claims for denial of their First Amendment freedom of association rights are dismissed as

[3] There is no allegation of either.

to Serafino and Gallup.

4. Fourth Amendment Search and Seizure

Defendants move to dismiss Plaintiffs' § 1983 claims for allegedly violating their Fourth Amendment protection against unreasonable searches and seizures. Plaintiffs offer no opposition.[4] Accordingly, these claims are dismissed as to Serafino and Gallup.

5. Fifth Amendment Due Process

Plaintiffs allege that their Fifth Amendment rights were violated. Fifth Amendment Due Process protections apply only to actions by the federal government. Cherry v. Jorling, 31 F. Supp. 2d 258, 270 (W.D.N.Y. 1998). There are no allegations that Defendants acted as agents of the federal government. Plaintiffs' Fifth Amendment Due Process § 1983 claims are dismissed as to Serafino and Gallup.

6. Fifth Amendment Taking

Defendants argue that the Fifth Amendment protection against takings without just compensation proscribes conduct by federal, not state or municipal, officers. Plaintiffs argue that the Fifth Amendment has been incorporated into the Fourteenth Amendment. See Chicago B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897). This dispute may be more wordplay than substance. Plaintiffs' Fifth Amendment § 1983 claims are dismissed as to Serafino and Gallup who are not alleged to have acted as federal agents. Plaintiffs' allegations of Fifth Amendment violations by takings without just compensation as incorporated into the Fourteenth Amendment are not subject to dismissal.

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[4] Plaintiffs do defend their Fourth Amendment rights as incorporated into the Fourteenth Amendment. Accordingly, Plaintiffs' § 1983 claims that Defendants violated their rights incorporated into the Fourteenth Amendment are not dismissed.

Defendants assert, without supporting legal argument or citation, that there is no assertion of "public use" to support Plaintiffs' claim. This assertion is without merit. Defendants are state and municipal officers. Plaintiffs allege Defendants consumed their food and occupied their property. If done in a official capacity, this constitutes a public use. A temporary occupation can constitute a taking. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

Serafino and Gallup are individuals, not governmental entities. Only governmental entities, and not individuals, can be liable for takings violations. Vicory v. Walton, 730 F.2d 466, 467 (6th Cir. 1984) ("[t]he wrongful 'taking,' detention or theft by an individual of the property of another is not a constitutional 'taking' as that term has been defined by the [F]ifth [A]mendment").

Plaintiffs' § 1983 claims for denial of their Fifth Amendment protection against takings without just compensation are dismissed as to Serafino and Gallup.

7. Fourteenth Amendment Equal Protection

Defendants move to dismiss Plaintiffs' § 1983 claims for allegedly violating Plaintiffs' equal protection rights. Plaintiffs concede that these claims should be deleted. Such are dismissed as to all Defendants.

8. Fourteenth Amendment Due Process

Defendants next argue that Plaintiffs do not allege that they had a right to hearing and they were denied one. Therefore, Defendants argue that Plaintiffs have failed to allege any procedural due process violations. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a

meaningful time and in a meaningful manner.") (internal quotation marks omitted).[5] Plaintiffs' § 1983 procedural due process claims are dismissed as to Serafino and Gallup. Plaintiffs object, saying that this would mean that if Defendants had merely "advised [Plaintiffs] in advance . . ., then their activities would have been constitutionally permissible." This argument is without merit. Plaintiffs' other constitutional rights are unaffected by dismissal of their Fourteenth Amendment procedural due process claims.

Defendants next argue that if Plaintiffs "claim the conduct violated a specific textual protection afforded by the Constitution . . . then there is no substantive due process claim." See e.g., County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) ("Substantive due process analysis is therefore inappropriate . . . if [the] claim is 'covered by' the Fourth Amendment."). It is not clear what this argument proves. Plaintiffs allege violations of their Fourteenth Amendment due process rights and their First, Fourth, and Fifth Amendment rights, presumably to the extent incorporated into the Fourteenth Amendment. To the extent Plaintiffs allege a violation of a specifically incorporated right, it will be analyzed according the law of that right. To the extent that Plaintiffs allege a violation of a due process that is not covered by a specifically incorporated right, it will be analyzed according to the law of substantive due process. Defendants claim that Plaintiffs do not point to conduct claimed to violate only substantive due process.

Plaintiffs argue that Defendants violated their property rights by prohibiting their accessing their possessions inside the Norwalk Inn. However, they allege no property

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[5] Compare Plaintiffs' Opposition Memorandum which misquotes Lachance v. Erickson, 118 S. Ct. 753, 756 (1998), and Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

possessed inside the Norwalk Inn.

Plaintiffs also argue that their privacy rights may have been violated by Defendants' access to the Norwalk Inn's business records, including compensation records, tax records, personnel records, medical information, and other confidential information. However, there is no allegation Defendants actually accessed any of this information.

Plaintiffs also argue that stockholders are entitled to due process protection. The argument is without merit. A stockholder before Defendants' acts remained a stockholder after. No change to their interests, as such, is alleged despite Plaintiffs' conclusory contrary assertions. There is no assertion that the value of her shares decreased. Further, the right to sue for any economic harm done to the Norwalk Inn belongs to the Norwalk Inn, not to a stockholder.

Defendants muster arguments that their alleged actions do not amount to a Fourteenth Amendment Due Process violation. Arguments for each Plaintiff are discussed in turn.[6]

a. Plaintiff Elaine Katsaros

Elaine Katsaros alleges she was denied entry to the Norwalk Inn by Defendants. Defendants' motion cites no legal proposition why such denial would not violate her liberty interest in travel. Also unresolved is why an improper threat of arrest which causes a plaintiff to change her behavior from an otherwise free choice is not a substantive due

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[6] Except Peter Handrinos, who does not bring a § 1983 claim and therefore does not allege a violation of his Fourteenth Amendment Due Process rights.

process violation. Defendants' motion to dismiss Elaine Katsaros's § 1983 claim of violation of her Fourteenth Amendment Due Process rights is denied.

b. Plaintiff George Katsaros

George Katsaros is an employee of the Norwalk Inn. He alleges monetary damages caused by Defendants. In addition to the discussion above of Elaine Katsaros's liberty interest in travel and freedom from threat of improper arrest, Defendants' motion cites no legal basis for why denying access to his place of business would not interfere inter alia with his property interest in earning compensation.[7] Defendants' motion to dismiss George Katsaros's § 1983 claim of violation of his Fourteenth Amendment Due Process rights is denied.

c. Plaintiffs Chris and Vasiliki Handrinos

Chris and Vasiliki Handrinos are employees of the Norwalk Inn. They also allege monetary damages caused by Defendants. Defendants' motion to dismiss fails as discussed regarding George Katsaros above. In addition, Defendants fail to show why Gallup's alleged entry into Plaintiffs' home without their consent would not violate their property interests in their home under the Fourth Amendment rights as incorporated in the Fourteenth Amendment. The motion to dismiss Chris and Vasiliki Handrinos's § 1983 claims of violation of their Fourteenth Amendment Due Process rights is denied.

d. Plaintiff Norwalk Inn

Defendants argue that since it is alleged that they merely ate some food and used

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[7] Plaintiffs also allege that Defendants' acts in terminating Plaintiff George Katsaros's employment violated his property interest in employment. However, Plaintiffs do not allege that he was terminated, let alone that Defendants played any role in his termination.

some bedding without prior notice, that this is not the kind of claim that "cr[ies] out for relief under the Constitution of the United States." Therefore, they argue that a due process violation as to the corporate Plaintiff Norwalk Inn is not alleged. It is curious that Defendants consider themselves not accountable for going into someone's home or hotel without authority and arbitrarily helping themselves to food and use of bedding. Their claim of de minimus is without merit.

Not as incredulous, but certainly meriting critical scrutiny is Defendants' citation for their proposition, Daniels v. Williams, 474 U.S. 327 (1986), that "it is settled that acts or omissions which are negligent do not provide [a] basis for a cause of action pursuant to 42 U.S.C. § 1983." Defendants' characterization of their acts as negligent is not only unfounded but smacks of arrogance. The motion to dismiss Plaintiff Norwalk Inn's § 1983 claim of violation of its Fourteenth Amendment Due Process rights is denied.

IV. CONCLUSION

Defendants' motion to dismiss (Dkt. No. 38) is **granted in part** and **denied in part**. Plaintiffs are granted permission to amend their complaint.

SO ORDERED.

Dated at New Haven, Connecticut, February __, 2001.

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Peter C. Dorsey
Senior United States District Judge